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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of: )  
)  
DUKE ENERGY CORPORATION )  
)  
)  
(Catawba Nuclear Station, )  
Units 1 and 2) )  
)

Docket Nos. 50-413-OLA  
50-414-OLA

RESPONSE OF DUKE ENERGY CORPORATION TO THE QUESTIONS  
CERTIFIED TO THE COMMISSION BY MEMORANDUM AND ORDER  
(RULING ON SECURITY-RELATED CONTENTIONS)

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I. INTRODUCTION

On April 21, 2004, the Nuclear Regulatory Commission (“Commission”) issued a Memorandum and Order accepting certification of certain security-related questions from the NRC Atomic Safety and Licensing Board (“Licensing Board” or “Board”) presiding in this license amendment proceeding.<sup>1</sup> These certified questions, discussed in the Licensing Board’s April 12, 2004 Memorandum and Order,<sup>2</sup> relate to a security-related contention proposed by Intervenor Blue Ridge Environmental Defense League (“BREDL”). In response to the Commission’s request, Duke Energy Corporation (“Duke”) herein addresses the certified questions and the admissibility of Security Contention 1. See CLI-04-11, slip op. at 1, 7-8.

<sup>1</sup> *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, \_\_ NRC \_\_ (slip op. April 21, 2004).

<sup>2</sup> *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), ASLBP-03-815-03-OLA (slip op. April 12, 2004) (Safeguards Information) (“Board Order”).

The Licensing Board's April 12, 2004 Order generally seeks further guidance on the proper application of the Commission's decision in CLI-04-06.<sup>3</sup> The Licensing Board raises the issue: "to what extent do the principles of CLI-04-06 relate to the post-9/11 Category I fuel facility security orders, in the context of the issue posed by BREDL in Contention 1?" Board Order, slip op. at 26. In addition, the Licensing Board would have the Commission revisit and elucidate its prior decision that compliance with the post-9/11 general security orders applicable to commercial nuclear power plants is not an issue in this proceeding, to address what the Licensing Board refers to as "the indispensability/measurement issue." *Id.* at 30.

The Commission explicitly determined in CLI-04-06 that this license amendment proceeding "has nothing to do with the NRC's post-September 11 general security orders [to reactor licensees]. It is not those orders, but Duke's MOX-related security submittal, that details the particular security measures that will be taken as a consequence of the presence of the MOX fuel assemblies at issue here." CLI-04-06, slip op. at 9 (footnote omitted). These "principles" should be reiterated and extended to the site-specific orders issued post-9/11 to the Category I fuel facilities operated by Nuclear Fuel Services ("NFS") and BWXT.<sup>4</sup> It is not the post-9/11 orders issued to the Category 1 facilities, but Duke's security plans relating to the presence of unirradiated mixed oxide ("MOX") fuel at Catawba Nuclear Station ("Catawba"), set forth in Duke's submittal in support of its application for a license amendment, that detail the incremental measures to be taken to safeguard the MOX fuel between the time it is received at

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<sup>3</sup> *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, \_\_ NRC \_\_ (slip op. Feb. 18, 2004).

<sup>4</sup> "Category I" facilities are licensed to possess formula quantities of strategic special nuclear material. There are currently two such licensed facilities in the United States. 67 Fed. Reg. 78,130 (Dec. 23, 2002).

Catawba and when it is irradiated. This proceeding focuses specifically on the adequacy of those measures under the particular circumstances of this case. *See* CLI-04-06, slip op. at 10.

The “principles of CLI-04-06” in no way support a conclusion that BREDL will require access to the post-9/11 Category I facility security orders at any time to litigate security contentions in this case — Intervenor’s protestations to the contrary notwithstanding. Nor is Duke’s license amendment application deficient because it fails to “address the post-9/11 revised design basis threat for Category I facilities,” as the Intervenor asserts in its proposed Security Contention 1. The Commission should reaffirm and clarify these principles as necessary and, based upon an application of the principles and the rules on admissibility of contentions, should dismiss proposed Security Contention 1 as inadmissible.

The post-9/11 *general* security orders, *i.e.*, those issued to power reactors, also are *not* relevant to proposed Security Contention 1. As formulated by BREDL, that proposed contention addresses only Category I facilities and the orders issued to those facilities. No reason exists to revisit the Commission’s “need to know” determination in CLI-04-06 relating to the post-9/11 reactor security orders. Duke has not relied on the reactor security orders in a manner inconsistent with the guidance in CLI-04-06 such as to change the Commission’s prior “need to know” decision. Instead, Duke’s reliance on and characterization of those orders as a baseline for the incremental security changes to be implemented for the receipt and storage of MOX fuel are entirely consistent with the principles announced in CLI-04-06. Duke’s reliance on and characterization of that baseline also do not support admissibility of Security Contention 1 or any other contention in this proceeding.

The discussion certified by the Licensing Board appears to extend beyond the admissibility of Security Contention 1 to the issue of “need to know” that may arise at the next

stage of this proceeding with respect to any admitted contention (*i.e.*, during discovery). However, it may be premature to address these issues. Any such disputes that arise should seemingly be viewed in the specific context of a discovery request in which the “need to know” questions arise. Moreover, the positions of the parties, particularly the NRC Staff, on any specific “need to know” issue must be solicited in order to reach a proper decision. In order to expedite the resolution of this case, it may be helpful for the Commission to elucidate CLI-04-06 as it may apply to “need to know” with respect to the general security orders *after* admission of contentions. However, the discussion certified by the Licensing Board in this regard is not germane to the admissibility of Security Contention 1.

## II. BACKGROUND

This proceeding relates to Duke’s February 27, 2003 license amendment request (“LAR”) to allow the use of four MOX fuel lead assemblies at Catawba. The lead assemblies are intended to support the potential future use of larger quantities of MOX fuel as part of the U.S. Department of Energy (“DOE”) plutonium disposition program, an important nuclear non-proliferation program undertaken by the United States in conjunction with Russia and the international community. Duke has indicated its plan to load the MOX lead assemblies at Catawba in Spring 2005. In its LAR Duke requested that the NRC issue the license amendment by August 2004.<sup>5</sup> This schedule for NRC action was intended to support DOE’s schedule for export of feed material to France to fabricate the MOX lead assemblies.<sup>6</sup>

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<sup>5</sup> See February 27, 2003 letter from M. Tuckman, Duke, to the NRC, dockets 50-369, 50-370, 50-413, 50-414 transmitting the MOX fuel LAR, at 2.

<sup>6</sup> *But see* the Licensing Board’s April 28, 2004 “MEMORANDUM and ORDER (Setting Schedule for Discovery and Hearing on Security-Related Matters)” (setting a Sept. 8-9, 2004 hearing for security contention(s) in this case, which will preclude the possibility of a final NRC decision on these issues before DOE must ship the feed material abroad for timely fabrication of the MOX fuel lead assemblies).

In connection with the LAR, Duke filed proposed revisions to the Catawba physical security plan and a related request for exemption (the "Security Submittal") on September 15, 2003.<sup>7</sup> Counsel and a technical consultant to the Intervenor, BREDL, were granted access to the Security Submittal under the terms of a Protective Order. After the Commission in CLI-04-06<sup>8</sup> resolved the parties' disputes concerning the Intervenor's access to the NRC's post-9/11 security orders issued to reactor licensees, BREDL filed proposed contentions on the Security Submittal.<sup>9</sup> Duke opposed admission of all of the security contentions on grounds that they failed to meet NRC standards for basis and specificity in 10 C.F.R. § 2.714, as well as the Commission's expectations set forth in CLI-04-06.<sup>10</sup> Oral argument was held March 18, 2004, in a closed session before the Licensing Board.

On April 12, 2004, the Licensing Board issued a Memorandum and Order ruling on BREDL's security-related contentions.<sup>11</sup> With regard to Security Contention 1, however, the

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<sup>7</sup> See September 15, 2003 letter from M.S. Tuckman, Duke, to the NRC, Docket Nos. 50-369, 50-370, 50-413, 50-414, re "Revision 16 to Duke Energy Corporation Physical Security Plan and Request for Exemption from Certain Regulatory Requirements in 10 CFR 11 and 73 to Support MOX Fuel Use" (transmittal letter and 7 attachments).

<sup>8</sup> In CLI-04-06, the Commission reversed the Licensing Board and determined that BREDL did not have the requisite "need to know" to be granted access to the post-9/11 security orders issued to power reactors, in that BREDL failed to show that the protected information was "indispensable" to its ability to frame litigable security contentions.

<sup>9</sup> See "Blue Ridge Environmental Defense League's Contentions on Duke's Security Plan Submittal" (March 3, 2004) ("Security Contentions") (Safeguards Information).

<sup>10</sup> See "Answer of Duke Energy Corporation to the 'Blue Ridge Environmental Defense League's Contentions on Duke's Security Submittal'" (March 16, 2004) ("March 16 Duke Response") (Safeguards Information). The NRC Staff also opposed admission of the proposed security contentions.

<sup>11</sup> In addition to certifying questions to the Commission, the Board Order reformulated and admitted one of BREDL's proposed contentions, BREDL Security Contention 5, and rejected three of the remaining contentions (Security Contentions 2, 3, and 4). However, it essentially swept the bases proffered for those rejected contentions into the admitted

Licensing Board determined “to seek further guidance from the Commission on what appears to us to be a rather significant coalescence of several pertinent related questions.” Board Order, slip op. at 33. The Licensing Board generally certified to the Commission under 10 C.F.R. § 2.718(i) its discussion relating to Security Contention 1, encompassing as well its discussion of the Commission’s recent ruling CLI-04-06.<sup>12</sup> The Licensing Board did not rule on the admissibility of Security Contention 1. On April 21, 2004, the Commission issued a Memorandum and Order, CLI-04-11, in which it accepted the Licensing Board’s certification.

The Licensing Board’s formulation of the issues certified to the Commission is worded generally, and its 10-page analysis of the issue in the discussion of BREDL proposed Security Contention 1 addresses a number of points. For the purposes of responding, Duke has focused first on the question posed by the Board Order at p. 26, regarding the extent to which the “principles of CLI-04-06 relate to the post-9/11 Category I fuel facility security orders,” in the context of Security Contention 1. These principles should be extended to the fuel facility post-9/11 security orders. These principles do not, however, support the admissibility of proposed Security Contention 1. Additionally, Duke addresses the Licensing Board’s discussion of the proper application of CLI-04-06 with respect to the post-9/11 *general* security orders issued to reactor licensees. Although the latter question is not raised in Security Contention 1 as formulated by BREDL (the contention addresses only the *Category I facility orders*), the Licensing Board’s discussion clearly raises this matter to the Commission for its consideration. Duke concludes that nothing in this discussion supports re-visiting the “need to know”

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Security Contention 5, thereby broadening that contention. Board Order, slip op. at 40, 47, 51.

<sup>12</sup> See Board Order, slip op. at 74 (the Board certifies “the questions raised in and arising out of Security Contention 1, and relating to issues addressed by the Commission in CLI-04-06, as discussed above in our analysis on the contention”).

determination in CLI-04-06, and that nothing in the discussion should support admission of Security Contention 1 or any other contention in this proceeding.

### III. ARGUMENT

#### A. The Post-9/11 Security Orders Issued to Two Specific Category I Fuel Facilities Are Not Relevant to this Licensing Proceeding

As proposed by BREDL, Security Contention 1 asserted that “Duke’s revisions to its security plan and its exemption application are deficient because they fail to address the post-9/11 revised design basis threat for Category I nuclear facilities.” Security Contentions at 3. In its discussion of Security Contention 1, the Licensing Board addresses the applicability of the holding of CLI-04-06 to the question of the relevance of the NRC’s post-9/11 Category I fuel facility security orders to the review of Duke’s MOX fuel-related Security Submittal. The Licensing Board recognizes that “the Commission has indeed indicated . . . that the [Part 50] post-9/11 security orders that were issued to various [reactor] licensees are not relevant in this proceeding.” Board Order, slip op. at 24. However, the Licensing Board distinguishes CLI-04-06<sup>13</sup> and suggests that “it might be found that CLI-04-06 does not apply to the Category I facility post-9/11 security orders . . .” *Id.* The Licensing Board hypothesizes a construction of CLI-04-06 that might, in the Board’s words, “leave open” the claims in Security Contention 1 concerning the existence of an alleged change in the concept of “undue risk to the public health and safety,” and the alleged need for Duke to address “any *de facto* revised DBT” found in the NRC post-

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<sup>13</sup> Specifically, the Licensing Board notes that: “CLI-04-06 dealt with an appeal *not* relating specifically to any post-9/11 orders issued to Category I facilities, but relating, rather, to the post-9/11 orders issued to reactors — specifically, to orders issued for Catawba (and related documents).” *Id.* (emphasis in original).

9/11 Category I facility orders. *Id.* at 24-25.<sup>14</sup> According to the Licensing Board, this would arguably provide a rationale for admitting Security Contention 1.

The specific issue before the Commission in CLI-04-06 dealt with BREDL's claim that it had fulfilled the "need to know" requirement contained in 10 C.F.R. § 73.21(c) so as to be able to gain access to the NRC's post-9/11 NRC *general* security orders applicable to commercial nuclear power plants. As recognized by the Licensing Board, the Commission did not in CLI-04-06 address access to the Category I fuel facility orders. Nevertheless, the Commission's reasoning in CLI-04-06 regarding the relevance of the Part 50 facility orders applies with equal or greater force to the issue of the relevance of specific Category I facility orders to this proceeding. In CLI-04-06, the Commission stated that this licensing proceeding "has nothing to do with the NRC's post-September 11 general security orders," that those orders are not at issue here, and that Duke's MOX-related security arrangements will not be measured or evaluated against those post-9/11 general security orders. CLI-04-06, slip op. at 9-10. Similarly, as Duke has maintained throughout, the fuel facility security orders are not at issue here. Catawba is a Part 50 reactor and the circumstances at Catawba are not equivalent to the Category I fuel fabrication facilities operated by BWXT and NFS that were subject to site-specific security orders. Security Contention 1 did not suggest otherwise. No basis was

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<sup>14</sup> In connection with proposed Security Contention 1, BREDL asserted: "As discussed below in Contention 1, . . . the Commission revised and replaced the regulatory definition of the design basis threat in 10 C.F.R. § 73.1 in enforcement orders issued to nuclear power plants and Category I facility licensees. Therefore it is not possible to determine whether Duke's application satisfies the Commission's current concept of adequate protection against the design basis threat, without access to these confidential documents." Security Contentions, at 2-3. This claim forms the basis for BREDL's argument in Contention 1 that: "By changing the definition of the design basis threat, the Commission has changed the concept of what constitutes 'no undue risk' to public health and safety and the common defense and security, such that mere compliance with NRC regulations will not suffice." *Id.* at 4.

presented for asserting the relevance of those orders to this case. Accordingly, this case has “nothing to do” with the post-9/11 Category I facility orders just as it has “nothing to do” with the Part 50 facility orders. The focus of this case should be on the incremental security enhancements set forth in Duke’s Security Submittal, evaluated on their own terms against the NRC’s regulations, considering the particular circumstances of the present case.

The Licensing Board suggests, consistent with BREDL’s position, that the issuance of specific orders to two licensees that operate fuel fabrication facilities indicates that the Commission may have established a *de facto* revised design basis threat (“DBT”) that would apply to Catawba if not exempted. Board Order, slip op. at 24-25. Such a position is contrary to established principles of administrative law. Commission orders establish requirements only for those to whom the orders are issued.<sup>15</sup> They do not repeal the requirements of regulations generally (*e.g.*, 10 C.F.R. § 73.1(a)(2)); nor do they establish *de jure* or *de facto* a new review standard, *i.e.*, a revised generic Category I DBT, to be applied to licensees other than the recipient of the order (*e.g.*, Catawba). The Commission acted entirely within its discretion in issuing site-specific orders to address the specific circumstances of the BWXT and NFS facilities but, in doing so, did not set generic requirements applicable to Catawba (whether or not MOX fuel is present at Catawba).

In suggesting that the DBT applicable to BWXT and NFS might also be applied to Catawba, the Licensing Board relied on a response of the NRC Staff to the effect that an order applicable to Catawba possibly could be issued at some undefined point in the future, possibly depending on the threat conditions at the time. Board Order, slip op. at 25, *citing* Tr. 1315.

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<sup>15</sup> See, *e.g.*, “Revision of the NRC Enforcement Policy,” 65 Fed. Reg. 25,368, 25,381 (May 1, 2000) (“An order is a written NRC directive to modify, suspend, or revoke a

However, the possibility of a future order, and the possible contents of such order (*e.g.*, whether it even would address any change in the DBT), are matters for speculation and do not support consideration of the specific Category I facility orders at this time. The Licensing Board is bound by and must consider the substantive regulations that exist now.<sup>16</sup> The possibility that regulations might change in the future or that orders might be issued does not provide a basis to bootstrap speculative future changes into a present standard to be used to judge the pending application.

The Licensing Board also reasoned that if Duke relies upon the NRC's post-9/11 orders issued to Category I facilities, or if the NRC Staff intends to evaluate the Security Submittal against those orders, this would arguably support a conclusion that BREDL has a

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license; to cease and desist from a given practice or activity; or to take such other action as may be proper (see 10 C.F.R. 2.202)."

<sup>16</sup> Clearly, the Licensing Board is bound by current NRC regulations. *See Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 170 (1995) (affirming the rejection of a challenge to the licensee's decommissioning plan, the Commission noted that Intervenors did not contend that the plan failed to comply with NRC regulations, but rather argued that the applicable NRC regulations are inadequate to protect public health and safety — an assertion that constituted an improper collateral attack on NRC regulations). A petitioner may not "demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 334 (1999) (Affirming denial of license renewal contentions that challenged issues addressed generically by existing NRC regulations (on-site radiological waste storage, disposal of high-level waste and spent fuel) or by pending Commission rulemaking (transportation of spent fuel to an offsite repository)). Similarly, contentions that proffer "additional or stricter requirements" than those imposed by current regulations are barred. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001), *citing Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987) (Rejecting as an impermissible challenge to NRC regulations intervenors' arguments that the 10-mile emergency planning zone should be "adjusted" to improve safety).

“need to know” with respect to the content of those orders.<sup>17</sup> However, as the Licensing Board has been aware,<sup>18</sup> Duke was not and is not now privy to the facility-specific Category I facility orders. Those orders are designated as Classified National Security Information; Duke could not and did not rely on them in developing its MOX fuel-related security enhancements for Catawba. Rather, Duke relied on the applicable requirements contained in 10 C.F.R. Part 73 for the DBT related to theft or diversion (*e.g.*, 10 C.F.R. § 73.1(a)(2)).<sup>19</sup> The NRC Staff has also informed the Licensing Board that it would not rely on the Category I facility-specific orders or the Standard Review Plan associated with Category I fuel facilities<sup>20</sup> in establishing the basis for its review of the acceptability of Duke’s Security Submittal.<sup>21</sup> Rather, because of the unique situation presented by the use of MOX fuel assemblies containing Category I material at Catawba (which

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<sup>17</sup> In discussing the “need to know” criterion” set forth in CLI-04-06, the Board comments that the “indispensability” and “relevance” of the post-9/11 reactor orders is tied to whether or not Duke or the Staff intends to measure Duke’s security arrangements for MOX fuel against those orders. The Board continues: “Logically, the same principle could be applied to the post-9/11 Category I facility orders — *i.e.*, if either Duke or the Staff has any ‘intention of measuring Duke’s security arrangements for MOX against last year’s general security orders’ issued to Category I facilities, this would very arguably make them relevant and indispensable to BREDL such that it might have a ‘need to know’ with regard to them.” Board Order, slip op. at 27.

<sup>18</sup> See Board Order, slip op. at 26; Tr. 1299.

<sup>19</sup> As noted by the Commission, NRC license applications are measured against regulatory standards, not against enforcement orders. CLI-04-06, slip op. at 9, n. 21.

<sup>20</sup> Standard Review Plan for Safeguards Contingency Response Plans for Category I Fuel Facilities, NUREG-6667 (May 2000).

<sup>21</sup> See “NRC Staff’s Motion for Interlocutory Review of the Licensing Board’s January 29, 2004 Order Finding a Need-to-Know and Ordering NRC Staff to Provide Petitioner with Access to NRC Documents Containing Safeguards Information,” Jan. 30, 2004, at p. 4.

is a Part 50 reactor, not a fuel facility), the NRC Staff elected to establish specific review guidance for this case.<sup>22</sup> That guidance states the scope and criteria to be applied in its review.<sup>23</sup>

The Licensing Board suggests that the situation considered in CLI-04-06 is distinguishable because it only addressed general reactor security orders, and that the issue raised in Security Contention 1 “brings us . . . to a new stage of this proceeding” regarding the post-9/11 reactor orders and (arguably) Category I facility orders, where BREDL’s need for this Classified Information is arguably “indispensable.” Board Order, slip op. at 31 (emphasis omitted). However, Security Contention 1 does not bring us to a new stage in the proceeding. It is only a proposed contention. Moreover, with respect to the Category I facility-specific orders, the Commission’s conclusion in CLI-04-06 should apply with even more force. The Category I facility-specific security orders will *not* apply to the review of Duke’s Security Submittal and they do not set a standard for measuring Duke’s Security Submittal. BREDL does not require access to these orders to either prepare or litigate security contentions.

B. The “Principles of CLI-04-06” Do Not Support Admissibility of Security Contention 1

The Licensing Board has, in effect, certified to the Commission the question of the admissibility of Security Contention 1. For the reasons discussed in Duke’ March 16, 2004 Response to the proposed security contentions, the Commission must reject proposed Security Contention 1 because it is deficient as a matter of law. The proposed contention fails to

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<sup>22</sup> See Memorandum to Glenn M. Tracy, Director, NRC Division of Nuclear Security, from Joseph W. Shea, Director, Nuclear Security Policy Project Directorate, re “Review Plan for Evaluating the Physical Security Protection Measures Needed for Mixed Oxide Fuel and Its Use in Commercial Nuclear Power Reactors” (Jan. 29, 2004).

<sup>23</sup> While the NRC Staff reviewers may have had access to the Category I plant-specific orders for NFS and BWXT during the course of their work on other projects, that fact alone does not bring those documents and the requirements that might be set forth therein within the scope of documents and standards material to this case.

specifically identify and support the existence of a genuine dispute on a material issue of law or fact as required by 10 C.F.R. § 2.714(b)(2)(iii).

In particular, proposed Security Contention 1 fails to identify any “credible vulnerability” with respect to theft of the MOX fuel assemblies from the Catawba facility, contrary to the Commission’s expectations in CLI-04-06 (slip op. at 10) and also contrary to NRC requirements for specificity in pleading contentions.<sup>24</sup> See March 16 Duke Response, at 8-10. Security Contention 1 never specifically addresses the Duke Security Submittal, never identifies any specific perceived deficiencies in Duke’s proposed security measures, and never explains why the enhancements identified in the Security Submittal are insufficient to address the potential theft of the MOX lead assemblies. See BREDL Contentions at 3-4. Rather, BREDL focuses entirely upon access to the Category I fuel facility orders and has never shown, with basis, how those orders might be applicable to a Part 50 reactor facility. Thus, Security Contention 1 does not meet NRC basis and specificity requirements.

BREDL claims in the basis for this proposed contention that the Commission’s standard of “no undue risk” has changed as a result of a changed definition of the design basis threat in 10 C.F.R. § 73.1, such that “mere compliance with NRC regulations will not suffice.” Security Contentions, at 4. This aspect of the proposed contention constitutes an impermissible

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<sup>24</sup> The Commission explicitly directed that BREDL must review Duke’s Security Submittal and “identify credible vulnerabilities, if any.” CLI-04-06, slip op. at 10. This is a substantive burden that gives further clarity and context to the existing basis and specificity requirements in 10 C.F.R. § 2.714. BREDL fails to identify any “credible vulnerabilities” in Duke’s Security Submittal in proposed Security Contention 1. In using the “credible vulnerabilities” language, the Commission was emphasizing the need for the Licensing Board, in considering the consequences in terms of the sensitivity of security issues and the potential for disclosure of sensitive information, to assure that a genuine dispute exists prior to admitting any security contention. The Commission stated its awareness of the “delicate balance between fulfilling our mission to protect the public and providing the public enough information to help us discharge that mission.” *Id.*

challenge to NRC regulations. The “no undue risk” standard has not changed: it continues to apply as before, under the Commission’s general performance objectives and requirements for physical security established in 10 C.F.R. § 73.20(a).<sup>25</sup> This argument is fundamentally a recasting of the argument that the two facility-specific orders are the standard: they are not, as discussed above. Moreover, BREDL does not establish, with specificity and basis, how Duke will fail to meet the relevant standard. See March 16, 2004 Duke Response at 3-4. For all of these reasons, the Commission should clearly determine that Security Contention 1 is not admissible.

C. Duke’s Baseline Reliance on the Existing Part 50 Facility Security Measures Does Not Provide a Basis for Reconsideration of the Commission’s “Need to Know” Determination in CLI-04-06 or Admission of Security Contention 1

In certifying its discussion of Security Contention 1, the Licensing Board has in effect asked the Commission to revisit its ruling in CLI-04-06 that the NRC’s post-9/11 reactor security orders are not material to this stage of the proceeding and that BREDL has not demonstrated a “need to know.” The Licensing Board acknowledged that BREDL Security Contention 1 asserts only the failure of the LAR and the Security Submittal to address the “post-9/11 revised design basis threat for Category I nuclear facilities.” Thus, “the post 9/11 reactor orders addressed in CLI-04-06 are not at issue in [Contention 1].” Board Order, slip op. at 32. Nevertheless, in its analysis of the contention, and in raising the “indispensability/measurement issue,” the Licensing Board revisited in detail the issue of “need to know” with respect to the

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<sup>25</sup> Under that regulation, the “physical protection system shall be designed to protect against the design basis threats of theft or diversion of strategic special nuclear material and radiological sabotage as stated in [10 C.F.R.] § 73.1(a)” and the licensee “shall establish and maintain . . . a physical protection system which will have as its objective to provide high assurance that activities involving special nuclear material are not inimical to the common defense and security, and do not constitute as unreasonable risk to the public health and safety.”

general security orders issued to reactors as well as the orders issued to two Category I facilities. *See, e.g.*, slip op. at 32. Duke, however, sees no basis to revisit that “need to know” determination at this time in the present context.

In CLI-04-06, the Commission clearly established that the focus of this proceeding is not the general security orders; rather, it is “Duke’s MOX-related security submittal, that details the particular security measures that will be taken as a consequence of the presence of the MOX fuel assemblies at issue here.” CLI-04-06, slip op. at 9. The Commission further specified that: “All parties to this adjudication, including BREDL, may safely assume, as a baseline, that Duke’s Catawba facility will comply with all applicable general security requirements, both those prescribed in NRC rules and those prescribed by NRC order.” *Id.* at 10. Thus, the Commission found, Duke’s compliance (with all applicable general security requirements) is “not at issue in this MOX license amendment case.” *Id.* The issue is the increment: “the appropriate heightening of security measures — necessitated by the proposed presence of MOX fuel assemblies at the Catawba reactor site.” *Id.* The NRC Staff, noted the Commission, “will not itself use the requested safeguards documents in its planned review of Duke’s license amendment application.” *Id.* at 4.<sup>26</sup>

Notwithstanding the clarity of the Commission’s intent, in addressing Security Contention 1 the Licensing Board focuses on one sentence in the Commission decision, taking it out of the context of the decision as a whole, and concludes that further guidance is needed. The sentence from CLI-04-06 reads: “Here, as the pleadings before us represent, neither Duke nor the NRC staff has any intention of measuring Duke’s security arrangements for MOX against

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<sup>26</sup> The Commission added: “The Staff maintains that it will review Duke’s security submittal on the basis of currently applicable standards only — 10 C.F.R. §§ 73.5 and

last year's general security orders issued to reactors." CLI-04-06, slip op. at 9-10. The Licensing Board suggests that this sentence means that, to the extent there is any "measuring" against the post-9/11 Part 50 facility security orders, those orders become "relevant and indispensable" to BREDL. Board Order, slip op. at 27. The conclusion would then be that there is a basis for a "need to know" with respect to those orders. *Id.* The confusion regarding this point permeates the Board Order and produces a result clearly not intended by the Commission in CLI-04-06.

The thrust of the Commission's decision in CLI-04-06 is that Duke and the parties may appropriately rely upon the currently mandated security capabilities at a Part 50 reactor facility as a baseline. In stating that neither Duke nor the NRC Staff will measure Duke's security enhancements for MOX fuel against the general security orders, the Commission was addressing the statements made by Duke and the NRC Staff that Duke's Security Submittal describes the *incremental* changes in the security program necessitated by the receipt and presence of MOX fuel assemblies, and that such changes are additive in nature and do not eliminate or detract from the measures taken or to be taken in response to the Commission's general security orders applicable to the Catawba facility.<sup>27</sup> The sentence in CLI-04-06 is a basis for the Commission's essential conclusion that "[a]ll parties to this adjudication, including BREDL, may safely assume, as a baseline, that Duke's Catawba facility will comply with all applicable general security requirements, both those prescribed in NRC rules and those prescribed by NRC order." CLI-04-06, slip op. at 10.

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11.9 — which are available in the *Code of Federal Regulations*." CLI-04-06, slip op. at 4.

<sup>27</sup> See "Duke Energy Corporation's Response in Support of the NRC Staff's Motion for Interlocutory Review of the Licensing Board's January 29, 2004 Order" (Feb. 6, 2004), pp. 6-7; 12, 18 (Safeguards Information).

At the March 18, 2004 oral argument on the security contentions, the Licensing Board pressed counsel for Duke as to whether there was “reliance” on the remainder of the security plan (and indirectly on the post-9/11 general security orders that form part of the basis for the security plan) with regard to the safeguarding of the MOX fuel assemblies from theft. Board Order, slip op. at 28-29; Tr. 1284-86. The responses of counsel were intended to convey that the underlying program that is relied on to protect the facility as a whole against the radiological design basis threat would also have the effect of protecting the MOX fuel at the site.<sup>28</sup> The protection is the same for any fuel, whether it be low enriched uranium (“LEU”) fuel or MOX fuel. Such measures represent the “baseline” for the additive measures set forth in the Security Submittal that will be applied when the MOX lead assemblies are onsite prior to irradiation in the reactor. Duke’s reliance upon and characterization of the “baseline” are in complete harmony with the Commission’s approach in CLI-04-06. It should not be read as “measuring” against the post-9/11 Part 50 security orders or as a basis to revisit the Commission’s determination regarding access to those orders prior to proposing contentions. It also should not be read as a basis to admit contentions.

A practical example illustrates the point Duke has made. To fulfill the requirements to protect against an armed, violent assault for the purposes of committing radiological sabotage, reactor licensees must take measures to defend against the revised radiological DBT as defined in the post-9/11 general (Part 50) security orders. The security force would take certain prescribed actions to defend the site against such an attack, whether or not MOX fuel or LEU fuel were present onsite. Clearly, in defending against an assault, Duke’s

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<sup>28</sup> The fuel will be located in a vital area which already must be protected pursuant to radiological sabotage requirements to prevent access to the vital area. 10 C.F.R. § 73.55(h)(4)(iii)(A).

armed responders would act without knowing whether the attackers' intentions were for radiological sabotage or for theft. (Their reaction, of necessity, would be the same whether LEU or MOX fuel happened to be at the site.) Similarly, there is "baseline" reliance on other measures in the security plan (e.g., the Protected Area Boundary fence, television cameras, lighting, and the existence of the Central Alarm Station). However, in accordance with CLI-04-06, these measures are not in place because the MOX fuel is onsite; therefore, the specific adequacy of these measures, and Duke's current compliance with the post-9/11 orders, do not represent the appropriate focus of contentions in this proceeding. Rather, Duke's Security Submittal discusses at length the *incremental* measures that would be taken during DOE's delivery of the MOX fuel, its receipt and acceptance by Duke, and its storage and placement in the reactor for irradiation — including the additional security personnel that would be present, their actions, and the physical arrangements to protect the MOX fuel at the site. These incremental measures are the appropriate focus for contentions.

The Licensing Board specifically contemplates whether "baseline" reliance on the existing plan provides a basis to revisit the "need to know" issue decided in CLI-04-06, because the information now has become "indispensable." Board Order, slip op. at 27. It is not clear exactly what guidance the Licensing Board seeks, given the current procedural context. However, if the Board's focus is on revisiting the issue of whether BREDL had a "need to know" the general security orders prior to proposing security contentions, there is no basis to revisit that issue. Duke's reliance on and characterization of the "baseline" is entirely consistent with the approach outlined in CLI-04-06. If the Licensing Board seeks guidance on whether BREDL *now* has a "need to know" this information in order to address any admitted contentions, it is reaching that issue prematurely — before the NRC Staff has even been asked to address the issue. The

Commission may, of course, elucidate CLI-04-06 as that decision may apply to access to the post-9/11 Part 50 facility orders *after* admission of contentions. Under present circumstances, such guidance would facilitate the expeditious resolution of this proceeding on security issues.

Finally, if the certified question focuses on admissibility of contentions, the “indispensability/measurement issue” has no bearing. Security Contention 1 does not pertain to the Part 50 facility security orders as discussed above. More broadly, mere reliance on the “baseline” is not a reason to admit contentions. In accordance with CLI-04-06, security contentions in this proceeding must be directed to the appropriateness and effectiveness of the incremental measures taken to protect the MOX fuel at Catawba. To have a litigable contention, the Intervenor must demonstrate that a genuine issue exists pursuant to 10 C.F.R. § 2.714, by alleging sufficient facts to show that a “credible vulnerability” exists in the incremental security planning. Proposed Security Contention 1 did not meet that standard.<sup>29</sup>

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<sup>29</sup> Duke also believes that in admitting BREDL Security Contention 5 in its April 12, 2004 Order, the Licensing Board read this important requirement out of CLI-04-06.

IV. CONCLUSION

In ruling on the questions certified by the Licensing Board, the Commission should (1) confirm the *inapplicability* of the post-9/11 Category I facility orders to this proceeding; (2) determine the *inadmissibility* of proposed Security Contention 1; (3) decline at this juncture to revisit its conclusions regarding access, prior to proposing contentions, to the post-9/11 Part 50 facility security orders; and (4) provide any further guidance as the Commission may consider appropriate to assure an expeditious and efficient resolution of the security contentions in this proceeding, including guidance regarding access to the Part 50 facility orders after a contention is admitted.

Respectfully submitted,



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ATTORNEYS FOR DUKE ENERGY  
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Dated in Washington, District of Columbia  
This 5<sup>th</sup> day of May, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
DUKE ENERGY CORPORATION ) Docket Nos. 50-413-OLA  
(Catawba Nuclear Station, ) 50-414-OLA  
Units 1 and 2) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the "RESPONSE OF DUKE ENERGY CORPORATION TO THE QUESTIONS CERTIFIED TO THE COMMISSION BY MEMORANDUM AND ORDER (RULING ON SECURITY-RELATED CONTENTIONS)" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 5<sup>th</sup> day of May, 2004. Additional e-mail service, designated by \*\*, has been made this same day, as shown below.

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